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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE HECTOR ROBLES, Defendant and Appellant.	F075573 (Super. Ct. No. LF011170A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING AND DISSENTING OPINION

INTRODUCTION

Appellant Jose Hector Robles was convicted of several crimes arising out of an approximately 90-minute assault on the mother of his children, Cassandra N.[1] Among these crimes were torture and assault with a deadly weapon. The court executed a consecutive sentence on the assault with a deadly weapon count. Appellant contends the acts underlying the assault with a deadly weapon count were incident to the torture and also relied upon by the prosecution to prove torture. Accordingly, he contends the execution of his sentence violated Penal Code[2] section 654's preclusion against multiple punishment, and thus the punishment for the assault with a deadly weapon count must be stayed. He also contends the abstract of judgment must be corrected to reflect the court's oral pronouncement of judgment striking a one-year prison prior sentence enhancement. We remand with directions to the trial court to modify appellant's sentence staying execution of sentence on count 5 pursuant to section 654 and cause to be prepared an amended abstract of judgment. In all other respects, the judgment is affirmed.

PROCEDURAL BACKGROUND

A jury convicted appellant of corporal injury on the mother of his children (§ 273.5, subd. (a); count 1); torture (§ 206; count 2); child endangerment (§ 273a, subd. (a); count 4); assault with a deadly weapon, to wit, a knife (§ 245, subd. (a)(1); count 5); and criminal threats (§ 422; count 6). The jury found true allegations that appellant personally (1) inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) in the commission of count 1; (2) inflicted great bodily injury upon a person under the age of five (§ 12022.7, subd. (d)) in the commission of count 4; and (3) used a deadly or dangerous weapon, to wit, a knife

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1 Cassandra will be referred to by her first name, and appellant's children will be referred to by their initials to protect their privacy. No disrespect is intended.

2 All further statutory references are to the Penal Code.

(§ 12022, subd. (b)(1)) in the commission of count 6. In a bifurcated bench trial, the court found true that appellant had suffered a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced appellant to a life term with the possibility of parole, plus a one-year enhancement for the prison prior on count 2; the upper term of six years, plus six years for the infliction of great bodily injury enhancement on count 4, to be served consecutively; and one-third the middle term of one year on count 5, to be served consecutively. The court stayed punishment on counts 1 and 6 pursuant to section 654. Appellant's total prison sentence was an indeterminate term of life with the possibility of parole plus a determinate term of 14 years.

FACTS

Appellant and Cassandra had been in a relationship for four years and lived together. They have two children together, then three-month-old S.N. and then three-year-old H.N. On the evening of August 19, 2016, appellant's friend picked up appellant, Cassandra, and the children to go to a barbeque. While they were on their way to the barbeque, Cassandra told appellant they needed baby wipes. Appellant told his friend to take them back home because he felt Cassandra was disrespecting him (appellant). When they got back to the house, appellant and Cassandra went inside. Appellant told Cassandra he would get the baby wipes and that she did not have to repeat herself. Appellant pushed and shoved Cassandra and swung at her multiple times. He punched her once in the face, laughed, and told her not to call the police. Appellant then left the house, and Cassandra stayed home with the children. After appellant left, Cassandra called 911. She told the operator her boyfriend had just "beat [her] up" and that she was scared he would come back. A deputy sheriff responded to her call at approximately 6:45 p.m., and observed that Cassandra had multiple red bumps on her face and her head.

Appellant arrived back to the house at approximately 2:00 or 3:00 a.m. on August 20, 2016. Cassandra was sleeping and awoke to the sound of appellant coming in. Cassandra tried to talk to appellant, and appellant told Cassandra to take his shoes off

for him. Cassandra started to take appellant's shoes off and asked him how the barbeque was and why he was getting home so late. Appellant responded, "Why the fuck [do you] care?" and kicked Cassandra out of the way. Appellant then shoved her to the floor and started stomping on her with his shoes still on. He grabbed her by her hair and slammed her face on the floor multiple times. He hit her several times in the head with his fists. During this attack, appellant accused her of being unfaithful with a particular person. She denied it, and he said he did not believe her. Cassandra was screaming for appellant to stop, but he kept hitting her more while telling her to stop screaming. While Cassandra was still on the ground, appellant stood above her and twisted her jaw like he was trying to snap her neck. Appellant told Cassandra if she did not stop screaming, he would snap her neck and kill her. Appellant told Cassandra to scream louder while holding her jaw in a way that she could no longer scream. Appellant then told her to go wash the blood off her face.

At some point, S.N. woke up and started crying. Appellant held S.N. while Cassandra washed her face and continued to try to hit her. While appellant was holding S.N., Cassandra heard him whisper into S.N.'s ear, "I will kill you too." S.N. was still crying, and appellant told Cassandra to "shut her up." Cassandra took S.N., and appellant continued "socking" Cassandra in the face and head. He also grabbed Cassandra by the hair and banged her head against the wall several times while talking about videos of people getting their brains smashed and saying he always wanted to do something like that. Appellant continued to bang Cassandra's head against the wall on and off throughout the night. Appellant began eating pizza and throwing it at Cassandra.

At some point while Cassandra was still holding S.N., appellant pulled out his pocket knife, pulled out the blade, and held it up against Cassandra's neck. Appellant held her with both hands and said, "I'll kill you, bitch." He again brought up a friend of hers that he suspected she was unfaithful with and told her that because she was lying to him about it, he would kill her. While appellant was holding the knife to Cassandra's

throat, he started talking about cartel videos where people got their heads cut off. Appellant let her go and later poked her leg with the knife. Cassandra told appellant it hurt when he poked her in the leg, and appellant said, " 'what hurts?' 'I'm not doing anything to you.' "

At some point while Cassandra was holding S.N., appellant hit S.N. in the head with his fist.

Cassandra was eventually able to calm appellant down, and he fell asleep next to the knife. Cassandra was able to call 911, and at approximately 5:00 a.m., law enforcement arrived and arrested appellant.

After the incident, Cassandra experienced migraines. She experienced swelling, and her whole body was sore for two weeks. She was not able to lie down because she had knots on her head. She stayed at the hospital for three days. When admitted into the hospital, she was observed to have multiple bruises to her face and scalp as well as bruising on her left eye. She had a CAT scan that revealed a subdural hematoma, or a bleed within one of the layers of the brain, which can be lethal. S.N. suffered a skull fracture.

DISCUSSION

I. Application of Section 654

Appellant contends the court erred by failing to stay punishment on count 5 pursuant to section 654 because the assault with the knife was incident to the torture and because it was an assaultive act underlying the torture. We agree.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 precludes imposition of an unstayed sentence on the count subject to the lesser punishment. (*People v. Mesa* (2012) 54 Cal.4th 191, 195.) Section 654 has long been interpreted to preclude multiple punishments not only for a single act that violates more than one statute, but for an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.) Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. (*Latimer*, *supra*, at p. 1208.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether a defendant had separate objectives is a factual determination made by the trial court at the time of sentencing. (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.) "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence." (*People v. Brents* (2012) 53 Cal.4th 599, 618.) We review for " 'sufficient evidence in a light most favorable to the judgment, and presume in support of the [trial] court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.' " (*People v. Andra* (2007) 156 Cal.App.4th 638, 640–641.)

Appellant cites *People v. Mejia* (2017) 9 Cal.App.5th 1036 (*Mejia*) to support his argument that the sentence must be stayed because the prosecutor used facts underlying the assault with a deadly weapon count to argue appellant had committed torture against Cassandra. In *Mejia*, the defendant was charged with torture, spousal abuse and spousal

rape. The appellate court pointed out that torture can be achieved by either a single act or a course of conduct. (*Id*. at p. 1044.) The *Mejia* court reasoned:

> "Torture requires the infliction of great bodily injury with the intent to cause cruel or extreme pain and suffering. [Citation.] To satisfy that element, the statute necessarily requires the intentional commission of one or more assaultive acts, such as infliction of corporal injury on a spouse, committed with the intent to cause cruel or extreme pain and suffering. Accordingly, although a defendant may be convicted of both torture and of any or all of the underlying acts [citation], section 654 precludes imposition of unstayed sentences for both torture and any of the underlying assaultive offenses upon which the prosecution relies to prove that element." (*Mejia, supra*, 9 Cal.App.5th at pp. 1044–1045.)

In *Mejia*, the prosecutor referred to the torture charge as an "umbrella" over the entire course of conduct. (*Mejia, supra*, 9 Cal.App.5th at p. 1044.) The appellate court noted there was no evidence that any of the acts of rape were not a part of the course of conduct making up the torture and that the prosecutor did not attempt to distinguish the acts on that basis. (*Id*. at pp. 1045–1046.) The court also noted that though the prosecutor relied on a single act of assault for the spousal abuse count, there was no basis on the record to conclude it was either separate in time from the rest of the acts that constituted torture or was in some other manner distinct from those acts. (*Id*. at p. 1046.) The court concluded that the only conclusion supported by the record was the spousal abuse was part of the course of conduct that constituted torture. (*Ibid*.) The court found that section 654 required a stay of the sentences imposed for the spousal abuse and rape convictions because both offenses "were included among the acts underlying the torture count and were essential to satisfying an element of that offense." (*Mejia, supra*, at p. 1046.)

Here, because the prosecutor relied on the assault with the knife to prove the intent element of torture circumstantially, *Mejia* is apposite. The conduct constituting the torture was not specified in the information, jury instructions, or the verdict form. In his closing argument, the prosecutor argued, "The fact is, *the assault*, the [domestic violence]

…, the child endangerment, the criminal threats, you add those up in conjunction with his motive, that adds up to torture." (Italics added.)

"Torture has two elements: '(1) the infliction of great bodily injury on another; and (2) the specific intent to cause cruel or extreme pain and suffering for revenge, extortion or persuasion or any sadistic purpose.' " (*People v. Burton* (2006) 143 Cal.App.4th 447, 451–452.)

The prosecutor argued the intent element was proven by circumstantial evidence. He began his argument on the intent element in general by stating:

> "[Appellant] repeatedly threatened to kill her, but never acted on it. There's a reason he's not charged with attempted murder. He could have killed her. *He had the knife right there.*… So we know when he's threatening to kill her, there's some other intent there. And given his actions, when you consider those with what he was saying, that shows an intent just to make her feel true terror, to make her suffer in her mind, to make her think she's about to be killed in front of her children, even though he knows he's not intending to do that." (Italics added.)

The prosecutor then went on to list the evidence he contended proved appellant's intent to cause cruel and extreme suffering, including appellant telling Cassandra to scream louder while he was twisting her neck, the duration of the attack, and appellant's comments to S.N. so that Cassandra could hear. The prosecutor further stated:

> "The use of force in front of the kids, and most specifically, *the knife to the throat* while [Cassandra] held [S.N.] Picture it up in your mind. [Appellant] pulls [Cassandra] back by the hair, knife to her throat while her baby, inches away while she's holding her. That is not run of the mill domestic violence. That is particularly *cruel and extreme*, and that shows you this is something more than just a mindless rage." (Italics added.)

The prosecutor also listed what evidence proved that appellant had a sadistic or revengeful purpose, including appellant being motivated by feeling disrespected and throwing food at Cassandra. He goes on to say:

> "Think of the number of ways he thought to inflict pain and humiliation…. This isn't like a domestic violence incident where he just

> uses his fists, okay, we're done. Or just uses a weapon, a bat, okay, we're done. He keeps trying different things between the stomping, the punching, the slamming her head, twisting her neck, *using a knife*, degrading humiliation, threats to her, threats to [S.N.] All these different ways that he's trying to inflict pain, humiliation, you don't do that out of necessity or out of a rage. You do that when you enjoy it, or you at least enjoy the control that comes out of it." (Italics added.)

Based on the prosecutor's argument, it is likely the jury concluded the use of the knife was essential to the intent element of torture, and thus multiple punishment for both the torture and the assault with the knife is improper.

Respondent contends appellant harbored "multiple objectives" during the commission of his crimes: that he punched, shoved, and stomped on Cassandra with the objective of inflicting bodily injury for a sadistic purpose and that he engaged in the assault with a deadly weapon to show his disapproval of her answers to his questions about her alleged infidelity. Respondent's assertion is not supported by the record. Appellant accused Cassandra of infidelity at the beginning of the attack and grew more violent as he accused her of lying about it. Further, like in *Mejia*, the assault with the knife was not separated in time from the rest of the assaultive acts and was, like the prosecutor advanced, just one of the many ways appellant intended to cause cruel and extreme suffering against Cassandra. The prosecutor did not attempt to distinguish it; rather, he attempted to lump it into the entire course of conduct to show compound egregiousness resulting from the sum of all the acts.

Respondent also argues the fact the prosecutor used the acts underlying the assault to argue that appellant committed torture did not compel the trial court to find section 654 applied. Respondent cites *People v. Green* (1988) 200 Cal.App.3d 538, 543-545, footnote 5, for the proposition that "determination of separate objectives for purposes of section 654 is a question of fact for the trial court at sentencing, notwithstanding the position taken by the prosecution." Respondent's citation to this portion of *Green* does not support his argument. The footnote to which respondent cites reads, "The trial court

was not required to accept a statement by the prosecutor conceding that … section 654 applied to these two counts." (*Id.* at p. 545, fn. 5.) *Green* refers to the prosecutor's position at sentencing. The prosecutor's "position" to which we refer is his theory of guilt in the case. The prosecutor's theory of guilt is relevant to a section 654 analysis in the context of a torture by course of conduct case like *Mejia* and this case. (See *Mejia, supra,* 9 Cal.App.5th 1036.)

The trial court's finding that section 654 did not apply to the assault with a deadly weapon count is not supported by substantial evidence.

II. Correction of Abstract of Judgment

The probation report recommended imposition of a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b) on both the indeterminate and determinate terms. At sentencing, the trial court struck the prison prior term enhancement from the determinate term. The abstract of judgment reflects imposition of the one-year enhancement on both the indeterminate and determinate terms. Appellant asserts the abstract of judgment must be modified to reflect the correct sentence imposed orally by the trial court and as such the enhancement must be stricken from the determinate term abstract of judgment. Respondent agrees. We accept respondent's concession. Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.) "If the judgment entered in the minutes fails to reflect the judgment pronounced by the court, the error is clerical, and the record can be corrected at any time to make it reflect the true facts." (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13.)

DISPOSITION

The case is remanded with directions (1) to modify the sentence to stay execution of sentence on count 5 (§ 245, subd. (a)(1)) pursuant to section 654 and (2) to correct the determinate term abstract of judgment by deleting the one-year term enhancement

pursuant to section 667.5, subdivision (b). The trial court is directed to forward a certified copy of the amended abstract of judgment to the appropriate authorities.

In all other respects, the judgment is affirmed.

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DE SANTOS, J.

I CONCUR:

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PEÑA, J.

Poochigian, Acting P.J., concurring and dissenting,

"An assault is an unlawful *attempt*, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240, italics added.)[1] Thus, assault with a deadly weapon "requires proof only of an *attempt* to commit a violent injury upon the person of another. It does not require proof that an injury occurred. [Citation.]" (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275.)

In contrast, a defendant commits torture when he or she inflicts great bodily injury with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. (§ 206.) Thus, the actus reus of torture is the *actual* infliction of great bodily injury.

When a defendant commits the actus reus of torture, he or she is usually committing the actus reus of one or more other crimes as well, such as battery, infliction of corporal injury or attempted murder.

Section 654

Section 654 prohibits multiple punishment in two distinct situations. One is when "different crimes were completed by a 'single physical act.' [Citation.]" (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) The second is when more than one act – i.e., a course of conduct – "reflects a single ' "intent and objective." ' " (*Ibid.*)

In *People v. Mejia* (2017) 9 Cal.App.5th 1036 (*Mejia*), the defendant engaged in a horrific course of conduct that included tying up his wife, raping her, using a Taser on her, threatening to kill her, and locking her in a closet, among other detestable acts. He was convicted of torture; spousal rape with tying and binding; infliction of corporal injury on a spouse; and criminal threats. (*Id.* at p. 1039.)

Mejia held that section 654 precluded punishment for both torture and the underlying rape and infliction of corporal injury. The *Mejia* court rejected the Attorney

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

General's argument that the defendant had separate objectives in torturing and raping the victim. (*Mejia, supra,* 9 Cal.App.5th at p. 1045.) *Mejia* held that the defendant's objectives were irrelevant *because it was a single-act case, not a course-of-conduct case*. (*Ibid*.) The reason for this holding was that the torture and spousal rape charges were both based (at least in part) on the same physical act: rape. Therefore, the sentences on torture and spousal rape were punishing the *same* physical act, in violation of section 654. Specifically, *Mejia* held that section 654 applies "because *all* of the acts of spousal rape and of infliction of corporal injury on a spouse were *included among the acts underlying the torture count and were essential to satisfying an element of that offense*." (*Mejia, supra,* 9 Cal.App.5th at p. 1046, italics added.)

The present matter, however, is *not* a "single act" case. The actus reus of torture is the *actual* "inflict[ion]" of great bodily injury. (§ 206.) The torture charge in this case was not (and could not be) based on the physical act of holding a knife to the victim's throat without causing injury. To use *Mejia*'s language, the noninjury assault in this case was not an act "underlying" the torture count because it was not "essential to satisfying an element of that offense."[2] Thus, defendant's distinct physical acts of torturing (i.e., kicking, stomping, etc.) *and* assaulting (i.e., holding the knife to victim's throat) the victim constitute a course of conduct, not a single physical act.[3]

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[2] This distinction is muddied by *Mejia*'s unfortunate use of the word "assaultive" in describing the infliction of corporal injury. (*Mejia, supra,* 9 Cal.App.5th at p. 1044–1045.) *Mejia* was not referring to the *crime* of assault; indeed, the defendant in *Mejia* was not charged or convicted of assault. Instead, by using "assaultive" to describe spousal rape and infliction of corporal injury, *Mejia* was clearly using the word in the colloquial sense of a violent physical attack.

Even if *Mejia* intended for its holding concerning infliction of corporal injury and spousal rape to also apply to non-injury assaults, I would disagree with that dictum for the reasons stated herein.

[3] Thus, while the noninjury assault in this case is not analogous to the rape and infliction of corporal injury in *Mejia*; it *is* analogous to the criminal threats made in that case. *Mejia* applied a "different analysis" to the criminal threats because they are

Therefore, the question in our case is whether defendant's course of conduct was divisible or indivisible. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.) This determination "depends on the 'intent and objective' of the actor. [Citation.]" (*Ibid.*) "If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or *simultaneous* objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective *even though the violations share common acts or were parts of an otherwise indivisible course of conduct*. [Citation.]" (*Id.* at pp. 267–268, italics added.)

"[S]ection 654 applies only if there is no substantial evidence that supports the trial court's implied conclusion that [the assault was] not part of an indivisible course of conduct. [Citation.]" (*Mejia, supra,* 9 Cal.App.5th at p. 1046.)

Here, there is substantial evidence to support the trial court's implied conclusion defendant harbored multiple, independent, simultaneous objectives in torturing and assaulting the victim. The victim told defendant that she and another man "used to hang out and smoke." Defendant brandished a knife, held it to her neck and said, "[D]id it get passed that?" Defendant kept asking her that question, while holding the knife to her throat with his left hand. The victim insisted there was nothing more to her relationship with the man.

One reasonable inference from this evidence is that defendant held the knife to the victim's throat to force her to answer his questions. This is an objective that was

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"neither necessary to the commission of torture nor sufficient to satisfy any of its elements." (*Mejia, supra,* 9 Cal.App.5th at p. 1046.)

The same can be said of the assault in this case. Defendant's act of holding the knife to the victim's throat was not "necessary to the commission of torture nor sufficient to satisfy any of its elements." (*Mejia, supra,* 9 Cal.App.5th at p. 1046.) (Again, because a noninjury assault – i.e., mere *attempt* to commit a violent injury (§ 240) – cannot be the basis for a torture conviction, because torture requires the *actual* "inflict[ion]" of great bodily injury. (§ 206.))

independent – albeit simultaneous and overlapping – of the objective to cause the victim cruel or extreme pain by stomping and kicking the victim.

Conclusion

In sum, the torture and assault convictions are based on different physical acts. The torture conviction is based on defendant's physical acts of stomping, hitting, kicking, twisting, and punching, the victim. The assault with a deadly weapon conviction is based on the physical act of holding a knife to the victim's throat.

Moreover, these separate physical acts were not part of an indivisible course of conduct. That is, there was substantial evidence defendant had independent objectives in committing the separate physical acts (i.e., inflicting extreme pain vs. forcing victim to answering questions).

For these reasons, I respectfully dissent.[4]

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POOCHIGIAN, Acting P.J.

[4] Except for the majority's remand for corrections to the abstract of judgment, in which I concur. (Maj. opn., *ante*, at pp. 10–11.)